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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 733

J. HARVIE WILLIAMS, JULIUS PRUFER, EDWARD WEST, JR., CECIL C. HATFIELD, ROBERT A. PECK, BERNARD W. FREUND, GRACE T. SEAT, GRAYSON G. FENTRISS, WILLIAM GROSSMAN, AND JOE E. SWIGER, all citizens of the United States resident in Virginia,
Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, L. STANLEY HARDAWAY, Secretary, MILLS E. GODWIN, JR., Governor of the Commonwealth of Virginia, and MARTHA BELL CONWAY, Secretary of the Commonwealth of Virginia,
Appellees

On Appeal From the United States District Court for the Eastern District of Virginia, at Alexandria

PETITION FOR RECONSIDERATION AND A HEARING

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February 7, 1969

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Appellees

On Appeal From the United States District Court for the Eastern District of Virginia, at Alexandria

PETITION FOR RECONSIDERATION AND A HEARING

The appellants hereby petition this Honorable Court to reconsider its action of January 13, 1969 on their appeal in this case, and to grant appellants an opportunity to present their case on the merits in briefs and

oral argument. This case has come before the Court only upon appellants' Jurisdictional Statement filed November 12, 1968, which was addressed simply to the two questions of jurisdiction and substantiality.

I. ACTION OF THE SUPREME COURT

On January 13, 1969, the Supreme Court entered a Per Curiam decision in this case as follows:

"The judgment is affirmed".

This positive action by the Court appears necessarily to constitute a determination by the Court:

(a) that the Court has jurisdiction of this appeal, and

(b) that the questions involved are sufficiently substantial that the Court has, in fact, taken jurisdiction of the case on this appeal.

It is believed that the Court would not and could not enter such a decision and order of positive action if the Court did not, in fact, have and take jurisdiction of the case. Further, it is appellant's understanding that the Supreme Court will generally decline jurisdiction when the constitutional questions are not substantial. *Zucht* v. *King,* 260 U.S. 174, 43 S. Ct. 24 (1922). If the constitutional questions are not substantial, it is believed that the Court would enter an order denying or dismissing the appeal, but would not, on its motion alone, take positive action on the merits of the case by affirming the judgment below.

II. APPELLANTS' RIGHT TO APPEAL

Section 28 USCA 1253, under which this case has been presented to the Supreme Court on this appeal, provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injuncion in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

This statutory provision has generally been referred to as creating a "right to appeal" directly to the Supreme Court in any case properly qualifying under it as being within the jurisdiction of this Court. As declared in *Radio Corporation of America* v. *U. S.*, 95 F. Supp. 660 (D.C. Ill. 1950), affirmed in 341 U.S. 412, 71 S. Ct. 806, a decision by a three-judge court in any such case is appealable to the Supreme Court "as a matter of right". See also *Ryan* v. *Pennsylvania Public Utility Commission,* 44 F. Supp. 912 (D.C. Pa. 1942), appeal dismissed in 317 U.S. 702, 63 S. Ct. 162.

It is respectfully submitted that appellants' "right to appeal" under the cited statute, has been implicitly confirmed by the Supreme Court's action in this case. But such right of appeal is made meaningless if appellants are denied the opportunity to present their case on the merits under the United States Constitution by the filing of briefs and by oral argument.

If the appellees had filed a motion to affirm the judgment below, the appellants would have been permitted to file briefs opposing that motion, as provided in clause 4 of Supreme Court Rule 16. Such briefs could then have gone into the merits of appellants' case under the

Constitution on a limited basis, though beyond anything that was appropriate in its Jurisdictional Statement. However, the appellees made no filing of any motion to dismiss or to affirm. In view of this fact, it must be concluded, at the very least, that appellees did not choose to take any action in opposition to the appellants' statutory right to present their case on appeal to the Supreme Court in full on the merits through briefs and oral argument.

Of course, one recognizes too that a decision of the Supreme Court ruling in favor of plaintiffs' contentions under the Constitution, after plenary consideration on briefs and oral argument, would constitute "the law of the land" and could be readily *made effective as to all states* of the United States prior to the next election of the President and Vice President in 1972. Consequently, it is possible that the appellees might welcome a determination by the Supreme Court on the merits of the issues raised herein, although they opposed appellants' position in the lower court since a decision in appellants' favor in that court prior to the election in November 1968 could not have been made to apply as to all other states prior to that election.

Indeed, the lower court itself placed significant emphasis in its decision upon this point by stating that any limitation on the selecion by a state of presidential electors "must be nationwide". Placing these remarks in the penultimate paragraph of its opinion suggests the importance of this practical point in the minds of the judges of the lower court in reaching their decision. See the last paragraph on page 12a of the Appendix to appellants' Jurisdictional Statement.

In any event, the Supreme Court is the supreme judicial authority for the protection of the rights of

individuals against the stronger powers of others, whether individual, corporate, associative, or government, and for the protection of minorities against any unnecessary discounting or expropriation of their strength in favor of majorities.

Appellants' plea in this case is for the protection of the value of their votes as citizens of the United States in national elections of the President and Vice President against expropriation at the state level, of the strength of the number of persons their votes represent, by the majority or plurality of the votes of the citizens of the state as a whole. In the recent past this Court has faithfully heard the pleas of minorities for comparable protection and relief within the confines of the provisions of the Constitution.

The concerns of the public for more effective and fair representation of the people in the national elections of the President and Vice President through the removal of unnecessary inequities and weaknesses in the present system, have been extensively and continuously expressed in the press and other communications media before and since the recent election. Both houses of Congress have reflected this concern by undertaking hearings on the subject. The questions involved in this case are, beyond any doubt, *substantial* in the minds of the mass of the people and, possibly, even critical to the future stability of our national government.

This Court should not refuse to grant to appellants their right to appeal and to be heard in full in so important a question. This Court should not fail to act for the protection of the strength of minorities in the electoral system, if *any* basis for such action can be found in the Constitution.

III. CONSTITUTIONAL QUESTIONS RAISED ARE SUBSTANTIAL

A. The Apportionment Provisions of Section 2, Article I and of Section 2, Fourteenth Amendment Apply to "Representative" Electors of the President.

The pertinent provisions of Section 2, Article I of the Constitution, as amended by Section 2, Fourteenth Amendment, require apportionments of Representatives as follows:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. The actual Enumeration shall be made within three years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten years, in such Manner as they shall by law direct. . . ."

Under those Constitutional provisions Congress has the power to effectuate such apportionments according to the numbers of persons "in such manner as they (the Congress) shall by law direct". The provisions of every apportionment act enacted by Congress operate functionally also as provisions for apportionment of counterpart "Representative" electors of the President according to the number of persons in each state, even though such electors of the President are not specifically mentioned either in the above quoted provisions of the Constitution or in such apportionment acts. Section 1 of Article II of the Constitution, creating the offices of the counterpart "Representative" electors of the President, could not have made them more closely bound to, and inseparable from, the apportionment pro-

visions, acts, and procedures enacted by Congress as applying with respect to Representatives in Congress.

For a discussion of this point and of the substantive right of the people as citizens of the United States to elect one such elector apportioned to them according to their numbers who constitute their respective Congressional districts, see Spering, How to Make the Electoral College Constitutionally Representative, 54 A.B.A.J. 763 (August 1968), reprinted in the Congressional Record by Senator Bartlett (Alaska) in Vol. 114, No. 140 for August 22, 1968 at page E 7565, by Senator Mundt (South Dakota) in Vol. 114, No. 160 for September 30, 1968 at page S 11668, and by Representative Rarick (Louisiana) in Vol. 115, No. 10 for January 16, 1969 at page H 336.

Senator Mundt's presentation of that A.B.A.J. Article in the September 30, 1968 issue of the Congressional Record is part of his extended remarks on What To Do About the Electoral College, which commences on page S 11665, and in which he has had printed in full (on page S 11667) two very important statistical exhibits that are parts of the extensive record of factual evidence of the submergence of minorities proved in appellants' case in the lower court. These exhibits show the glaring fact, summarized in paragraph 5 on page 11 of appellants' Jurisdictional Statement, that the winning pluralities in from 38 to as many as 146 national (Congressional) districts, in the elections of 1952, 1956, 1960 and 1964, were totally lost to an opposing party's nominee by the overriding statewide vote, however small the latter's margin of victory.

B. The Significance of the Apportionment Provisions of the Constitution Is Substantial

In effectuating such apportionments, Congress provided that Representatives shall be elected by districts composed of a contiguous and compact territory, *and* containing as nearly as practicable an equal number of inhabitants, and that said districts shall be equal to the number of Representatives to which the state may be entitled in Congress, *no district electing more than one Representative.* See Apportionment Act of August 8, 1911, in Note in 2 U.S.C.A. 3, and earlier acts, starting with the Apportionment Act of June 25, 1842, 5 Stat. 491, c.47, R.S. #23.

Each of the above recited elements, which were contained in the 1842 Apportionment Act, was certainly regarded by Congress as a part of the constitutionally-established principle of apportionment. Indeed, the Report of the Select Committee of the House of Representatives concerning that Act of June 25, 1842 contained, in House Report No. 909 dated July 16, 1842 after President Tyler had approved the Act, in the words of the Committee's Chairman, John Quincy Adams, the former Senator and President, the following.

> "The President announces that one of his reasons for entertaining deep and strong doubts of the constitutionality of the law which he has approved and signed is, that it purports to be mandatory on the States to form districts for the choice of Representatives in single districts.
>
> "The committee believe this to be by far the most important and most useful provision of the act. They believe, indeed, the establishment of the principle absolutely indispensable to the preservation

> of this Union. The representation of the people by single districts is undoubtedly the *only* mode by which the principle of representation, in proportion to *numbers,* can be carried into execution. . . .
>
> "*Should the general ticket system universally* prevail, it is obvious that the representation in this House will entirely change its character, from a representation of the people to a representation of States, and transform the constitutional Government of the United States into a mere confederation like that which, fifty-four years ago, fell to pieces for the want of ligatures to hold it together."

These certainly are *not* statements of an insubstantial constitutional question!

Today, appellants' case has been pursued in the lower court and in this appeal with the express endorsement and support of eleven United States Senators, each of whom signed the letter dated May 16, 1968 to the American Good Government Society, a true copy of which is hereto attached, marked Exhibit A, and made a part hereof. These Senators, thus, have expressed their recognition of the *substantial* constitutional questions involved in appellants' case, and the need for their proper resolution.

The above recited elements of the apportionment were omitted from the Apportionment Act of June 18, 1929. But the Supreme Court, in its decision in *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S.Ct. 526 (1964) found and ruled that the command of Article I, Section 2, which (as amended by Section 2 of the Fourteenth Amendment) includes the above quoted apportionment provisions of the Constitution, nevertheless requires that the Congressional districts in each of the states

shall be essentially equal, or as nearly equal as is practicable. Footnote 10 of the opinion shows that the Court did not need to reach the arguments based on the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment. Thus, the *Wesberry* decision was based on the basic structure of the government as provided in Article I, and not upon the Fourteenth Amendment protections of civil rights of individuals. Implicit in its requirement of essential equality of districts appears to be recognition of a constitutional requirement of districts as the people's national voting units where apportionment to the people, according to their numbers, is effective under the Constitution.

Similarly, it is submitted that the basic principle of the apportionment provisions of the Constitution also requires that no district shall elect more than one Representative. Congress has recently re-enacted this requirement by amending the Apportionment Act of 1929 in the Act of December 14, 1967, P.L. 90-196, 81 Stat. 581, 2 U.S.C.A. 2c, as follows:

> "In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to section 2a(b) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected *only* from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress)". (Italics supplied)

Thus, Congress today does not consider election of Representatives by single-member districts, as opposed to statewide or at-large elections, an insubstantial Constitutional question! And, contrary to the statement of the lower court in the immediate case (page 11a of the appellants' Appendix), in that recent Act, 2 U.S.C.A. 2c, Congress has *not* expressly countenanced the election of Representatives from the State at large. In fact, it requires election by single-member districts *in all states* in all elections *after* the one in November 1968 in which the Ninety-first Congress was elected.

Mr. Justice Douglas, in his dissenting opinion in *Fortson* v. *Dorsey*, 379 U.S. 433, 440, 85 S.Ct. 498, 502 (1965) considered that elections in multi-member districts effectuated "invidious discrimination" as against single-member district elections, and would have ruled them unconstitutional.

In *Burns* v. *Richardson*, 384 U.S. 73, 89, 86 S.Ct. 1286, 1295 (1966), the Supreme Court, in footnote 14, stated:

> "Appellant Burns concedes in his brief that '(i)n the case of the Hawaii House multi-member districts, extensive proofs were not put in as to the details of the submergence of minorities.' There may, for example, be merit in the argument that by encouraging block voting, *multi-member districts diminish the opportunity of a minority party to win seats.* But such effects must be demonstrated by evidence." (Italics supplied).

It is submitted that the record in this case is replete with positive evidence, and findings by the lower court, of the "submergence of minorities" by the winner-take-all system of electing presidential electors estab-

lished by state statute. Ample evidence in this case demonstrates that at-large elections of "Representative" electors of the President, which are multi-member district elections, "diminish the opportunity of a minority party to win seats" of electors of the President. A greater diminishment than total destruction of the strength of any minority party could not possibly be found. Total isolation of the strength of any such minority party from either the majority or minority party in other states further emphasizes the invidious character of the system.

The Supreme Court's decision in *Colegrove* v. *Green*, 328 U.S. 549, 553, 66 S.Ct. 1198, 1200 (1946), speaking through Mr. Justice Frankfurter, was strongly dictated by its recognition that the evils of at-large elections of Representatives are worse than the election of Representatives by substantially unequal districts, stating as follows:

> "At best we could only declare the existing electoral system (of unequal districts in Illinois) invalid. The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket. *The last stage may be worse than the first.* The upshot of judicial action may defeat the vital political principle which led Congress, more than a hundred years ago, to require districting. This requirement, in the language of Chancellor Kent, 'was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave *the aggregate minority of the people* in a state, though approaching perhaps to a majority, to be *wholly overpowered by* the combined action of *the nu-*

> *merical majority,* without any voice whatever in the national councils.' 1 Kent, Commentaries (12th ed., 1873) *230-31, n. (c)." (Parenthetical material and italics supplied).

C. Some Significant Lower Court Errors

The lower court erroneously refers (page 6a of appellants' Appendix) to Thomas Jefferson as one of the "many Brahmins of the Constitutional Convention" along with James Madison and James Wilson. The lower court then places great importance upon Jefferson's advice to Virginia (in January 1800) to switch from district election of its electors to the general ticket system of electing all such electors on a statewide or at-large basis, as demonstrating that, quoting from page 7a of the Appendix:

> "Thus, it cannot be safely said that the draftsmen of Article II, Section 1 believed that the electors must be chosen by congressional or other districts, as plaintiffs here contend."

But, Thomas Jefferson (again referred to by the lower court at page 12a of the Appendix) was *not* a draftsman of the Constitution. Indeed, he was *not* even a participant at the Constitutional Convention at any time!

James Madison and James Wilson, on the other hand, were two of the most active participants and draftsmen of the Constitution. In fact, James Wilson of Pennsylvania, the highly-respected lawyer-framer of the Constitution who later became an Associate Justice of the United States Supreme Court, presented the first proposal of the idea of an electoral college for the election of the President when, early in the Convention on June

2, 1787, he made a motion that the states be divided into districts and that the persons in each district "elect members for their respective districts to be electors of the Executive magistracy, . . ." Moreover, James Madison, who apparently attended every session of the Constitutional Convention and provided us the most comprehensive Notes of each day's activities, wrote in a letter to George Hay, dated August 23, 1823, concerning the method of electing electors of the President:

> "The district mode was mostly, if not exclusively in view when the Constitution was framed and adopted; & was exchanged for the general ticket & the legislative election, as the only expedient for baffling the policy of the particular states which had set the example."

The lower court has chosen to ignore the foregoing important statements of these two actual participants in the Convention and draftsmen of the Constitution. As pointed out above, the lower court *erroneously* stated (page 11a of the Appendix) that Congress has expressly countenanced election of Representatives from the "State at large", whereas the Act of 1967, amending the Apportionment Act of 1929, now requires that no district elect more than one Representative.

The lower court, in its opinion, has completely overlooked and failed to discuss the appellants' above argument based upon the importance of the apportionment provisions of the Constitution to the basic character of representation of the people by single-member districts in the election of Representatives and in the election of the counterpart "Representative" electors of the President, although this argument was fully presented in the briefs and argument before the lower court. It was, of

course, also presented in lesser detail in appellants' Jurisdictional Statement.

The lower court also gave no attention in its opinion to the argument, presented by appellants, that the language of the Twelfth Amendment clearly provides for, and anticipates, divisions of the votes of the electors of a state among two or more nominees for President, and that state election laws *designed to preclude any such division* of the state's electoral votes are contrary to the *divisibility principle* of that Amendment.

CONCLUSION

The time limit (25 days) for preparing and filing this Petition for Reconsideration does not permit a comprehensive presentation herein on the merits of all the many important elements in support of appellants' appeal in this case on the facts and under the constitution. Furthermore, the purpose of this Petition is appropriately to urge this Honorable Court to permit appellants to present their case, in due course under the Court's Rules, in full on the merits by briefs and oral argument.

As has been pointed out in 54 A.B.A.J. 763 (August 1968) and on page 20 of appellants' Jurisdictional Statement, unless and until the disproportionate and unrepresentative power captured by slim pluralities (controllable in some states by organized political leaders) under the present winner-take-all system can be effectively broken under the present provisions of the Constitution, the great current efforts in Congress to amend the Constitution, with regard to this and other critical weaknesses in the processes of electing our Presidents, may be expected to wither away with-

out success as in all such previous great efforts mounted over the last 150 years. The leadership of some of the larger states has always been able to prevent any such constitutional amendment from achieving the necessary two-thirds vote in the House of Representatives where their strength is greatest.

The people, however, have a great Constitution of the United States that contains provisions for apportionment of Representatives and of counterpart "Representative" electors, according to the number of persons. Districts of the people composed of essentially equal numbers of people have been recognized by this Honorable Court as required under those provisions of Article I of the Constitution, as Congress had earlier found and declared. Congress has also found and declared that such constitutional apportionments call for and require single-member districts, *no district electing more than one* officer.

This Court should not shrink from examining this substantial question, of the gravest concern to the people. A decision by the Supreme Court ruling the winner-take-all system to be unconstitutional and requiring election of the counterpart "Representative" electors of the President by single-member national (Congressional) districts, would constitute the *gateway* decision that is necessary to enable the people to effectuate amendments of the Constitution to correct the critical weaknesses of the present system of electing our Presidents.

WHEREFORE, the appellants pray that this Honorable Court recognize that the questions presented herein are substantial and require plenary consideration, beyond the presentations possible or appropriate in this or ap-

pellants' earlier filing, for their resolution, and grant appellants the right on this appeal to submit their case in full on the merits by briefs and oral argument.

Respectfully submitted,

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February 7, 1969

Certificate of Good Faith

The undersigned counsel for the appellants hereby certify that the within Petition for Reconsideration and a Hearing is presented in good faith and not for delay.

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ROBERT L. MONTAGUE, III